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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Applicant: Lavien Group, LLC

Mark: LAVIEN

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EX PARTE APPEAL

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PRELIMINARY STATEMENT

Applicant Lavien Group, LLC appeals to the Trademark Trial and Appeal Board (the “Board”) from the Examining Attorney’s March 14, 2013 final refusal to register Applicant’s mark LAVIEN for “Financial services, namely, management and operation of private investment funds commonly known as hedge funds.” Registration of LAVIEN was refused under § 2(d) of the Lanham Act on the grounds of likelihood of confusion with Registration No. 3,701,703 for the mark LEVION INVESTMENTS for “financial investment in the field of securities and real estate.” Applicant submits, and demonstrates below, that the Examining Attorney’s refusal to register was erroneous primarily because:

- The Examining Attorney incorrectly determined that LAVIEN and LEVION “are essentially phonetic equivalents” (OA1¹ at 3). In fact, they differ significantly in sound when pronounced as they ordinarily would be in the English language. In reaching her conclusion, the Examining Attorney distorted and overextended the maxim that “there is no correct pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark” and postulated that the public would likely mispronounce LAVIEN as LEVION. (OA2² at 4.) The “no correct pronunciation” principle has only been applied to refute arguments that marks are not confusingly similar when “properly” (accordingly to the proponent) pronounced in non-standard or strained ways that the public is unlikely to adopt. It is not

¹ First Office Action, dated September 6, 2012.

² Second Office Action, dated March 14, 2013.

logically or properly applied where, as here, ordinary rules of English vowel sound pronunciation give marks clearly different sounds.

- The Examining Attorney also improperly gave absolutely no consideration to the “sophistication of the customers” *du Pont* factor. Where, as here, the record indicates that consumers of both Applicant’s and Registrant’s services are making purchasing decisions involving six and seven figure dollar amounts confusion between LAVIEN and LEVION INVESTMENTS is highly unlikely.

In addition, the Examining Attorney erred by dissecting Registrant’s mark and focusing exclusively on the LEVION element to the exclusion of the INVESTMENTS element, and by wrongly concluding that Applicant’s hedge fund management services are sufficiently related to Registrant’s real estate related services to support likelihood of confusion. A proper balancing of all the relevant factors leads to the conclusion that registration of Applicant’s mark should not have been refused under § 2(d) of the Lanham Act.

DESCRIPTION OF THE RECORD

A. Prosecution History

Applicant applied for the mark LAVIEN for “Financial services, namely, financial fund management” on May 11, 2012. Applicant’s mark was initially refused registration on September 6, 2012 in a non-final Office Action that cited the LEVION INVESTMENTS registration. Applicant responded to that Office Action on March 6, 2013, addressing the Examining Attorney’s refusal to register and narrowing the description of services to “Financial services, namely, management and operation of private investment funds commonly known as hedge funds.” The Examining Attorney issued a final refusal to register in a second Office

Action dated March 7, 2013. Applicant's Notice of Appeal was timely filed on September 9, 2013.

B. The First Office Action

In the First Office Action, the Examining Attorney refused registration under § 2(d) on the grounds of likelihood of confusion with the registered mark LEVION INVESTMENTS, noted a prior pending application for LEVION for computer software-related services that might lead to suspension of the Applicant's application pending disposition, and required clarification of the identification of services. In refusing registration, the Examining Attorney concluded that the marks were highly similar because LAVIEN and the LEVION element of the registered mark "are essentially phonetic equivalents and thus sound similar" (OA1 at 3), the "connotation and commercial impression does not change between the marks when used in connection with the applicant and registrant's goods" (OA 1 at 3), and that the marks were also "used in connection with similar services" (OA1 at 3-5). Although acknowledging that Applicant's and Registrant's services were different, the Examining Attorney reasoned that "the respective marks are substantially similar and therefore the services need not be identical . . . in order to find a likelihood of confusion." (OA1 at 4.)

C. Applicant's Response

In Applicant's Response to the First Office Action, Applicant argued that (a) the marks differ significantly in sound, appearance and commercial impression, (b) the services are not closely related, particularly in view of Applicant's narrowed identification of services, and (c) the "sophistication of the customers" *du Pont* factor is highly relevant here and must be considered. Applicant pointed out, *inter alia*, that two of the three vowel sounds in Applicant's mark and the LEVION element of Registrant's mark are different and lead to distinctly different

pronunciations of these elements accordingly to ordinary English language pronunciation rules. Applicant further showed that the consumers for both Applicant's and Registrant's services are making six and seven figure purchasing decisions. Such consumers will exercise a high degree of care and are unlikely to be confused as to the origin of the services. In response to the requirement to modify the identification of services, Applicant also narrowed the identification to "Financial services, namely, management and operation of private investment funds commonly known as hedge funds."

D. The Second Office Action

Only a week after Applicant filed its response, the Examining Attorney issued the Second Office Action making the refusal to register final. The Second Office Action substantially reiterated the arguments made in the First Office Action and gave almost no consideration to Applicant's arguments. The Examining Attorney dismissed Applicant's demonstration that the marks are pronounced very differently in accordance with the ordinary rules of English pronunciation by merely invoking, without analysis, the maxim that "there is no correct pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark." (OA2 at 4.) In response to Applicant's argument that the marks have different commercial impressions and connotations, the Examining Attorney, again without analysis, simply reiterated her initial view that the marks "appear to connote the same commercial impression, thus, the marks are confusingly similar." (OA2 at 4.) Finally, the Examining Attorney essentially declined to consider the customer sophistication *du Pont* factor at all. She dismissed it with the cryptic statement that "while although the relevant consumers may be wealthy and sophisticated, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the

field of trademarks or immune from source confusion.” (OA2 at 5.) In the Second Office Action, the Examining Attorney also accepted Applicant’s modification of the identification of services and withdrew the advisory notice regarding the prior pending application for LEVION for computer software-related goods and services.

ARGUMENT

A. Applicant’s and Registrant’s Marks are not Confusingly Similar.

In finding that Applicant’s mark LAVIEN and the Registrant’s mark LEVION INVESTMENTS are “confusingly similar” (OA1 at 3; OA2 at 4) the Examining Attorney erred in concluding (i) that the marks are “essentially phonetic equivalents” (OA1 at 3), and (ii) that the marks’ connotations and commercial impressions are the same.

1. The Marks are Not Phonetic Equivalents.

Applicant’s mark and the LEVION element of Registrant’s mark are different in appearance and sound. The sounds of the first and last of the three syllables of the two words LAVIEN and LEVION are quite different. The first syllable of Applicant’s mark, LA, has an “ah” or short a sound when pronounced in accordance with ordinary English pronunciation rules, whereas the first syllable of Registrant’s mark, LEV, has an “eh” or short e sound. Further, the last syllable of Applicant’s mark, EN, has a an “eh” or short e sound, whereas the last syllable of Registrant’s mark, ON, has a distinctly different “un” or short o sound. Applicant submits that these differences in two of the three vowel sounds in each of the marks’ first words makes the sound of the marks distinctly different, certainly not phonetic equivalents, and unlikely to cause confusion.

Further, the marks look different. The appearance of the initial elements of the two marks are quite different. The different vowels near the beginning (A versus E) and near the end

(E versus O) of each element are readily distinguishable and give the words different looks. They are thus unlikely to be confused even when viewed separately, rather than compared side by side. Indeed, marks closer in sound and appearance, differing by only one, not two, vowel sounds, have been found not likely to cause confusion, even where the goods are identical. *In re General Elec. Co.*, 304 F.2d 688, 134 U.S.P.Q. 190 (C.C.P.A. 1962) (VULCAN and VULKENE for electrical wires and cables not confusingly similar).

The Examining Attorney's reliance on the maxim that "there is no correct pronunciation of a mark" to refute the above is misplaced here and would wrench that principle from its logical and case law underpinnings. Properly applied, the principle refutes arguments that marks the public will likely pronounce the same way are not, in fact, confusingly similar because – the proponent of the challenged mark contends – there is a "correct" pronunciation of the challenged mark that is different but that would defy ordinary rules of English pronunciation or the way consumers are actually likely to pronounce the mark. It should not be applied where, as here, the natural pronunciations of the marks in questions would be distinctly different. Put differently, the "no correct pronunciation" maxim properly applies where stilted, unnatural or unlikely pronunciations are urged to create differences between otherwise similar sounding marks, but not where, as here, the ordinary and natural pronunciations would be different. It is logical to assume that consumers will not spontaneously adopt unnatural pronunciations. But there is no logic to support the Examining Attorney's notion that LAVIEN and LEVION are phonetic equivalents because consumers will not pronounce one or both in accordance with normal rules.

The cases on which the Examining Attorney relies, and other cases applying the "no correct pronunciation" maxim, show that it was created in the context of, and is applicable to, situations in which stilted, unnatural or unlikely pronunciations are urged to create differences in

sound that are unlikely to apply in the real world. *In re Viterra Inc.*, 671 F.3d 1358, 101 U.S.P.Q.2d 1905 (Fed. Cir. 2012), on which the Examining Attorney relied (OA2 at 4), affirmed the Board's affirmance of an Examining Attorney's refusal to register the mark XCEED for "agricultural seed" over the existing registration for X-SEED and design for "agricultural seeds." Applicant argued that the marks were "not phonetic equivalents" because XCEED is properly pronounced with the second syllable accented as if it were the word "exceed," whereas X-SEED would be pronounced with the accent on the X. The Board and the Federal Circuit rejected that argument, invoking the "no correct pronunciation" maxim because "it is hard to imagine that the two marks will not sound alike when spoken." 671 F.3d at 1367, 101 U.S.P.Q.2d at 1912. Pronouncing XCEED as if it were "exceed" would be unnatural and unlikely, even if it what the brand owner intended or preferred.

Similarly in *Centraz Indus. Inc. v. Spartan Chem. Co.*, 77 U.S.P.Q.2d 1698 (T.T.A.B. 2006), on which the Examining Attorney also relied (OA2 at 4), the Board sustained an opposition to registration of the mark ISHINE and design for "floor finishing preparations" by the owner of the registered mark ICE SHINE for "floor finishing preparations." The Board rejected Applicant's argument that the marks sound different if "properly pronounced," *i.e.*, if ICE and SHINE are carefully, precisely and distinctly separately articulated, relying on the "no correct pronunciation" maxim. 77 U.S.P.Q. 2d at 1701. Recognizing that Applicant's pronunciation of Opposer's mark would be unnatural and unlikely, the Board found it "quite reasonable" that purchasers would instead elide the two words of Opposer's mark so that it would sound "remarkably similar" to Applicant's. *Id.*

Interlego AG v. Abrams/Gentile Entertainment, Inc., 63 U.S.P.Q. 1862 (T.T.A.B. 2002), cited by the Federal Circuit in *Viterra*, is similar. The Board there invoked the maxim to sustain

an opposition to registration of MEGO for toys by the owner of the registered mark LEGO for toys. Applicant argued that the marks were dissimilar in sound because its mark was “properly” pronounced as if it were “Me-Go” with a long e sound, as opposed to Opposer’s mark, which is pronounced “Leg-O”. The Board rejected the notion that consumers would adopt Applicant’s unlikely, stilted pronunciation, even if Applicant made efforts to educate the public to do so, finding that “[a] more logical pronunciation of applicants’ mark MEGO is that it would be pronounced as a girl’s name (Meg) followed by a long ‘O’ sound.” 63 U.S.P.Q.2d at 1863.

These cases thus support the proposition that an alleged unnatural or unlikely pronunciation will not save a mark from being considered confusingly similar to another where the two marks will most likely be pronounced the same. They do not support the Examining Attorney’s opposite proposition that LAVIEN and LEVION are “phonetic equivalents” because some consumers might, in the Examining Attorney’s view, ignore the ordinary rules of English pronunciation and pronounce them identically. There is no reason to assume that consumers will tend to do that. This case is much closer to *In re General Elec. Co.*, 304 F.2d 688, 134 U.S.P.Q. 190 (C.C.P.A. 1962), which found the marks VULCAN and VULKENE for identical goods not confusingly similar. As in this case, the two marks would naturally be pronounced differently. The Examining Attorney essentially reasoned that *In re General Elec.* was wrongly decided because some consumers could, contrary to ordinary rules, pronounce the two marks the same way.

There is also no justification for the Examining Attorney’s complete disregard of the INVESTMENTS element of Registrant’s mark in the likelihood of confusion analysis. It is well established that for purposes of § 2(d) analysis marks are to be considered in their entirety and not dissected into their component parts. *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224

U.S.P.Q. 749, 750-51 (Fed. Cir. 1985). Here, even though the INVESTMENTS element of Registrant's mark is descriptive and disclaimed, it is part of the mark and must be considered. It cannot be entirely disregarded merely because consumers may tend to focus more on the first or the non-descriptive part of a trademark. Particularly when the marks are not erroneously viewed as "phonetic equivalents" (as the Examining Attorney viewed them), consideration of Registrant's mark as a whole indicates that LEVION INVESTMENTS is unlikely to be confused with LAVIEN alone.

2. The Marks have Different Connotations and Commercial Impressions.

The Examining Attorney also improperly ignored Applicant's demonstration that the commercial impressions of LAVIEN and LEVION are very different. LAVIEN has a soft, caring vaguely French sound and connotation, reminiscent of the name of Edith Piaf's famous song "La Vie en Rose." In contrast LEVION has a harder, more industrial sound and connotation. Consumers are unlikely to confuse these very different commercial impressions. Yet, even after acknowledging Applicant's argument (OA2 at 4), the Examining Attorney simply stated without analysis that "the terms 'LAVIEN' and 'LEVION' appear to connote the same commercial impression, thus the marks are confusingly similar." (*Id.*)

3. Arguable Relatedness of Applicant's and Registrant's Services does not Justify a Finding of Likelihood of Confusion between Applicant's and Registrant's Marks.

Applicant's and Registrant's services are not closely related. Registrant's services relate to real estate investment, as the specimen it submitted in connection with its application (Exhibit A to Applicant's Response to Office Action) makes clear. In contrast, Applicant's services relate to non-real estate private investment funds commonly known as "hedge funds." The Examining Attorney acknowledged that Applicant's and Registrant's services are not the same, but she

considered them related. In finding likelihood of confusion, the Examining Attorney relied on the legal proposition that “[g]enerally, the greater [the] degree of similarity between the applied-for mark and the registered mark, the lesser the degree of similarity between the services of the respective parties is required to support a finding of likelihood of confusion” and reasoned that “[i]n this comparison, the respective marks are substantially similar and therefore the services need not be identical in this comparison in order to find a likelihood of confusion.” (OA2 at 6.)

As demonstrated above, the cornerstone of that reasoning—that the respective marks are substantially similar—was erroneous. In fact they are significantly different. The invalidity of that cornerstone undermines the Examining Attorney’s conclusion of likelihood of confusion. Here, the opposite of the legal proposition the Examining Attorney applied—where the degree of similarity between the marks is low, a high degree of similarity between the services is required to support a finding of likelihood of confusion—supports a finding of no likelihood of confusion. Because the marks are not properly considered confusingly similar, any arguable relatedness of the services is insufficient to support a finding of likelihood of confusion.

B. Sophistication of the Relevant Consumers Makes Confusion Highly Unlikely.

The Examining Attorney failed properly to consider the customer sophistication factor in her analysis of likelihood of confusion. In addition to similarity of the marks and relatedness of the goods, other *du Pont* factors, including sophistication of the customers, must be considered in § 2(d) likelihood of confusion analyses where relevant. *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 718, 21 U.S.P.Q.2d 1388, 1392 (Fed. Cir. 1992) (Board reversed for failing to give due weight to sophistication of purchasers *du Pont* factor); *In re Davey Prods. Pty Ltd.*, 92 U.S.P.Q.2d 1198, 1203-04 (T.T.A.B. 2009); *In re Toshiba Med. Sys. Corp.*, 91 U.S.P.Q.2d 1266, 1272-74 (T.T.A.B. 2009). Circumstances suggesting care in purchasing,

including high expense of goods or services, tends to minimize the likelihood of confusion. As the Federal Circuit has noted, “[T]here is always less likelihood of confusion where goods are expensive and purchased after careful consideration.” *Elec. Design & Sales, Inc.*, 954 F.2d at 718, 21 U.S.P.Q.2d at 1392, quoting *Astra Pharm. Prods. v. Beckman Instruments*, 718 F.2d 1201, 1206, 220 U.S.P.Q. 786, 790 (1st Cir. 1983); *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 U.S.P.Q. 969, 971 (Fed. Cir. 1985) (no likelihood of confusion between NARCO and NARKOMED for similar products because only sophisticated purchasers exercising great care would purchase the relevant goods); *In re Homeland Vinyl Prods., Inc.*, 81 U.S.P.Q.2d 1378, 1382-83 (T.T.A.B. 2006).

In this application, the relevant consumers are wealthy investors considering or making investments of hundreds of thousands, if not millions, of dollars in hedge funds, in Applicant’s case, or real estate or securities representing interests in real estate in Registrant’s case. *See, e.g.,* Exhibit A to Applicant’s Response to Office Action (\$3,289,223 equity required for Registrant’s real estate investment). Such sums would only be invested with great care due to the cost and investors at such a high level can be expected to investigate the source of the services on which they are relying for the success of the investment. Hedge fund investments, and significant real estate investments, typically entail significant purchaser due diligence. For hedge funds, this involves review of a confidential private placement memorandum containing a description of the business, its management and the investment strategy. It would thus be clear to any investor that the services provided under the LAVIEN mark are unrelated to LEVION INVESTMENT’s services. In fact, SEC rules mandate that hedge fund managers such as Applicant may only deal with “accredited investors” who meet financial tests designed to insure sophistication. SEC Securities Act of 1933, Reg. D, Rule 501, 17 CFR 230.501(a), Rule 506, 17 CFR 230.506.

Courts have often held that where, as here, the relevant consumers are sophisticated and a significant amount of money is involved in the purchasing decision, there is no likelihood of confusion even where the marks involved are identical or similar. *E.g., Elec. Design & Sales, Inc.*, 954 F.2d 713 (no likelihood of confusion based on sophistication of the buyers, even though marks nearly identical); *Haven Capital Mgt. Inc. v. Havens Advisors, L.L.C.*, 965 F. Supp. 528 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1346 (2d Cir. 1998) (HAVENS ADVISORS not confusingly similar to HAVEN for mutual fund services given sophistication of investors and cost of investment); *Franklin Res., Inc. v. Franklin Credit Mgt. Corp.*, 988 F. Supp. 322 (S.D.N.Y. 1997) (customer sophistication significant factor in finding FRANKLIN CREDIT not confusingly similar to FRANKLIN for financial services); *Beneficial Corp. v. Beneficial Capital Corp.*, 529 F. Supp. 445 (S.D.N.Y. 1982) (customer sophistication and large sums involved significant factors in finding no likelihood of confusion).

The Examining Attorney dismissed any consideration of the customer sophistication factor, stating that “while although the relevant consumers may be wealthy and sophisticated, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion.” (OA2 at 5.) However, the cases on which the Examining Attorney relied in refusing to consider customer sophistication are inapposite and do not support rejection of that factor in this application.

Imagineering Inc. v. Van Klassens Inc., 53 F.3d 1260, 34 U.S.P.Q.2d 1526 (Fed. Cir. 1995) (OA2 at 5), was a trade dress infringement case involving furniture, in which the court upheld a jury verdict of infringement. The court noted that the customer sophistication factor could support the verdict because, although the customers were sophisticated, customer

sophistication was not sufficient to obviate confusion. The court noted that the record showed that even a trained furniture salesman could not distinguish the plaintiff's and the defendant's products. 53 F.3d at 1265, 34 U.S.P.Q.2d at 1529. Nothing similar is present here. There is nothing in the record to suggest that sophisticated customers prepared to invest six or seven figure sums would not be able to distinguish Applicant's services from the Registrant's services because of similarity of the marks. In fact, the record indicates the opposite—that the marks are dissimilar and would be readily distinguished by a purchaser exercising the care ordinarily exercised before investing large sums.

Nor does *Top Tobacco LP v. N. Atl. Operating Co.*, 101 U.S.P.Q.2d 1163 (T.T.A.B. 2011) (OA2 at 5), support the Examining Attorney's disregard of the customer sophistication factor here. In *Top Tobacco* the Board found that the customer sophistication factor was not sufficient to outweigh the other *du Pont* factors favoring likelihood of confusion because (a) the parties' marks could also be used for bulk or generic less expensive products for which "the buyers would not necessarily exercise any greater degree of caution" and might "make an impulse purchase," and (b) even as to the more expensive products the goods were not sufficiently "complex and extremely expensive" to insure that purchasers would likely exercise a high degree of care. 101 U.S.P.Q.2d at 1171. Here, in contrast, both Applicant's and Registrant's services are sufficiently expensive and complex that a high degree of care by purchasers is likely.

Proper consideration of customer sophistication here weighs heavily against a finding of likelihood of confusion. Both Applicant's and Registrant's consumers are sophisticated and are investing large amounts. They can be fully expected to exercise care and know with whom they are dealing. It is highly unlikely that any relevant consumer would invest a six or seven figure

sum in Applicant's hedge funds believing that he or she is investing in Registrant's real estate projects.

CONCLUSION

For all of the foregoing reasons, Applicant respectfully submits that the Examining Attorney has failed to meet her burden to demonstrate that registration of Applicant's mark LAVIEN should be refused because of likelihood of confusion with the registered mark LEVION INVESTMENTS. The Board should reverse the refusal to register.

Dated: November 8, 2013

Respectfully submitted,

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